Case No. D1DC14-100139

In the District Court for the 390th Judicial District, Travis County, Texas

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EX PARTE JAMES RICHARD "RICK" PERRY

BRIEF OF CONSTITUTIONAL AND CRIMINAL LAW EXPERTS AS AMICI CURIAE IN SUPPORT OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS

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STATEMENT OF INTEREST OF AMICI

Amici are an ideologically diverse coalition of experts in the fields of constitutional and criminal law—including former judges, solicitors general, prosecutors, criminal defense lawyers, constitutional litigators, and professors on both sides of the aisle. They represent virtually the entire political spectrum and have no personal or political stake in this case. They submit this brief for one simple reason: They are committed to the rule of law, and do not wish to see the law tarnished or distorted for purely partisan political purposes.

Floyd Abrams has served as counsel in many of the highest-profile First Amendment cases of the modern era, including representing *The New York Times* in the *Pentagon Papers* case. His most recent book is FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT (2013).

Michael Barone is a Resident Fellow at the American Enterprise Institute and the principal co-author of THE ALMANAC OF AMERICAN POLITICS.

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Jeff Blackburn is the Founder and Chief Counsel of the Innocence Project of Texas, an organization dedicated to securing the release of those wrongfully convicted of crimes in Texas and educating the public about the causes and effects of wrongful convictions.

Paul Coggins is the former United States Attorney for the Northern District of Texas (1993-2001), appointed by President Bill Clinton.

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Raul A. Gonzalez is a former Justice on the Texas Supreme Court (1984-1998), appointed by Governor Mark White and later elected as a Democrat.

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John T. Montford is the former District Attorney for Lubbock County, a former Texas State Senator (D-Lubbock), and the first Chancellor of the Texas Tech University System.

Theodore B. Olson is the former Solicitor General of the United States (2001-2004), and the former Assistant Attorney General for the Office of Legal Counsel at the United States Department of Justice (1981-1984).

Kenneth W. Starr is the former Solicitor General of the United States (1989-1993), and a former judge on the U.S. Court of Appeals for the D.C. Circuit (1983-1989).

Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law. He also runs UCLA's First Amendment Amicus Brief Clinic and is the author of THE FIRST AMENDMENT AND RELATED STATUTES (5th ed. 2013).[1]

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[1] Amici's institutional affiliations are provided only for purposes of identification. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. *See* TEX. R. APP. P. 11.

INTRODUCTION

Governor Rick Perry announced that he would exercise his constitutional authority to veto a bill if another political official did not do what he wanted. Then he vetoed that bill. For these two ordinary political acts, Governor Perry has been indicted on felony charges.

Both counts of the indictment are unconstitutional and must be dismissed. The first count—which criminalizes Governor Perry's veto of a bill—violates the separation of powers enshrined in the Texas Constitution. The Legislature is not allowed to criminalize the exercise of powers that the Constitution specifically confers on the Governor, including the veto power.

And the second count—which criminalizes Governor Perry's threat to veto a bill if Travis County District Attorney Rosemary Lehmberg did not resign her office—violates the First Amendment of the U.S. Constitution and Article I, Section 8 of the Texas Constitution. Governor Perry "threatened" to perform an act that the Texas Constitution specifically reserved to him (a veto) in order to encourage a public official to engage in a lawful act (a resignation). That is constitutionally protected speech.

* * *

We as amici take no position on the politics that led to this indictment. Reasonable people can disagree on the political tactics employed by both Governor Perry and his opponents. But to turn political disagreement into criminal prosecution is disturbing. To do so with an indictment riddled with constitutional infirmities is even worse.

The indictment of Governor Perry demands this Court's swift intervention. The writ of habeas corpus should be granted and this prosecution should come to an end.

ARGUMENT

I. Count I of the Indictment Should Be Dismissed, Because It Is Both Unconstitutional and Barred by Legislative Immunity.

Count I of the indictment essentially alleges that Governor Perry violated Section 39.02(a)(2) of the Texas Penal Code when he vetoed a bill that would have funded the continued operation of the Public Integrity Unit of the Travis County District Attorney's office. The prosecution alleges that Governor Perry exercised this veto "with intent to harm another"—namely, District Attorney Rosemary Lehmberg and the Public Integrity Unit.

But this Count suffers from two independently fatal flaws: (1) the Legislature is not allowed to criminalize the Governor's exercise of his veto power, and (2) Governor Perry is entitled to absolute legislative immunity for any exercise of his veto power.

A. Count I Violates the Constitutional Doctrine of Separation of Powers, Because the Legislature Cannot Criminalize the Exercise of a Governor's Constitutional Veto Power.

1. The Texas Constitution vests in the Governor the absolute authority to veto appropriations bills. *See* TEX. CONST. art. IV, § 14. The Governor is entitled to decide which laws he "approv[es]" and which he disapproves—without any constraint from the Legislature, or from special prosecutors. *Id.*

The Texas Constitution also includes an explicit separation of powers provision that sets forth the structure of Texas government:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

This express provision "reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). "So important is this division of governmental power that it was provided for in the first section of the first article of the Constitution of the Republic of Texas, and alone it constituted article 2 of each succeeding Constitution." *Langever v. Miller,* 76 S.W.2d 1025, 1035 (Tex. 1934)

For these reasons, courts have long been vigilant about preventing any attempt by one branch of the government to encroach on the authority constitutionally secured to another branch. Accordingly, "any attempt by one department of government to interfere with the powers of another is null and void." *Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987). The separation of powers provision is violated "when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." *Ex Parte Gill*, 413 S.W.3d 425, 431-32 (Tex. Crim. App. 2013).

Yet the prosecution today claims that Section 39.02(a)(2) criminalizes Governor Perry's veto of an appropriations bill. If that were true, then the statute would be plainly unconstitutional. The Legislature cannot make it a crime for the Governor to veto appropriation bills, because that would obviously "interfere[] with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." *Id.* Any such outlawing of the use of the veto power would unilaterally increase the Legislature's own power, by eviscerating the Governor's power to veto legislation he does not "approve" of—even though, under the Texas Constitution, *every* legislative bill is subject to veto. The Legislature cannot enact a statute that constrains that gubernatorial power, thereby enlarging its own.

Nor would the analysis be different if Governor Perry vetoed a bill "with intent to harm another." The Texas Constitution places no limits on the Governor's exclusive power to decide which bills to give his "approval." So the Legislature cannot empower the Judiciary to pass judgment on the Governor's intent behind a veto and chill the Governor's exercise of his veto power through the prospect of criminal punishment.

2. There are, of course, constitutional limits on the Governor's veto power. The Legislature can override a Governor's veto with a two-thirds vote. The Legislature can threaten not to enact laws that the Governor supports if he continues to exercise his veto in a manner with which it disagrees. The Legislature even has the power to impeach a Governor for a veto. And of course, the people of this State could always vote a Governor out of office because of a veto.

The Legislature can also criminalize acts of political corruption, such as the acceptance of a bribe in exchange for a veto. Notably, however, the illegal act in that circumstance is the acceptance of the bribe—*not* the veto itself. So a bribery prosecution would not trigger any of the separation of powers issues that plague this prosecution. *See, e.g.*, *United States v. Brewster*, 408 U.S. 501, 526 (1972) ("There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.").

None of these constitutionally permissible acts authorize criminal prosecution for the Governor's exercise of his constitutionally prescribed veto power.

3. It is not necessary to read Section 39.02(a)(2) in this clearly unconstitutional manner. There is no indication that the Legislature intended for the statute to be so read. This reading is the prosecution's own. This Court can, and should, avoid this constitutional controversy entirely, by declaring that the statute simply does not criminalize Governor Perry's

conduct. As explained in further detail in the Governor's application for a writ of habeas corpus and motion to quash the indictment, a Governor simply does not have "custody or possession" of a sum of money that starts out in the Texas Treasury, ends up in the Texas Treasury, and remains throughout in the Texas Treasury. Those funds are always in the custody of the Comptroller, not the Governor.

Not only would this be the most natural reading of the statutory text, but it would also avoid the constitutional infirmities raised by prosecuting Governor Perry for his veto. *See, e.g.*, *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011) ("We presume that when enacting legislation, the Legislature intends to comply with the state and federal constitutions, and we are obligated to avoid constitutional problems if possible.") (quotations and citation omitted).

* * *

The Constitution permits only two options: either (1) read Section 39.02(a)(2) the way the prosecution does, and then declare the statute unconstitutional, because it violates the separation of powers doctrine decreed in the Texas Constitution; or (2) avoid the constitutional issue altogether, by interpreting the statute not to apply to a Governor's veto of an appropriations bill. Either way, Count I must be dismissed.

B. Governor Perry Cannot Be Prosecuted for His Veto, Because He Is Entitled to Absolute Legislative Immunity for Any Exercise of His Veto Power.

Count I also suffers from a separate yet equally fatal flaw: a Governor has absolute legislative immunity from any prosecution based on the exercise of his veto power.

1. Legislative immunity is a common law doctrine that flows from the Speech or Debate Clauses of the Texas and U.S. Constitutions. *See In re Perry*, 60 S.W.3d 857, 859 (Tex. 2001) (citing U.S. CONST. art. I, § 6; TEX. CONST. art. III, § 21). It declares that "individuals acting in a legislative capacity are immune from liability for those actions." *Id.*

The reason for this legislative immunity is simple, as the U.S. Supreme Court has explained, and the Texas Supreme Court has endorsed:

> "[T]he threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct."

Id. (alterations in original) (quoting *Forrester v. White*, 484 U.S. 219, 223 (1988)).

And for precisely those same reasons, the motive behind a legislative act—be it partisan, personal, or parochial—is utterly irrelevant to the privilege of legislative immunity:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney v. Brandhove, 341 U.S. 367, 377 (1951). *See also Perry*, 60 S.W.3d at 859-60 ("The legislative immunity doctrine recognizes that it is not consonant with our scheme of government for a court to inquire into the motives of legislators.") (quotations and citation omitted).

2. Notably, legislative immunity extends to any official who is acting in a *legislative* capacity, whether or not the official is a member of the Legislature. For example, the Texas Supreme Court has held that legislative immunity protects the Attorney General and the Comptroller when they perform "legislative functions" as members of the Legislative Redistricting Board. *Id.* "Courts have extended the legislative immunity doctrine beyond

federal and state legislators to other individuals performing legitimate legislative functions," such as mayors, city council vice-presidents, and others. *Id.* at 860. Indeed, "[a]ctions to which courts have extended absolute legislative immunity include a mayor's veto of an ordinance passed by a city council." *Camacho v. Samaniego*, 954 S.W.2d 811, 823 (Tex. App.—El Paso 1997, pet. denied) (citing *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1194 (5th Cir. 1981)). "[W]hen the mayor of a municipality vetoes an ordinance passed by the city's legislative body, he performs a legislative function and is entitled to absolute immunity from a civil suit complaining about actions taken in his legislative capacity." *Hernandez*, 643 F.2d at 1194.

Just as a mayoral veto is a legislative act subject to legislative immunity, so too is a gubernatorial veto. Texas law is clear that a gubernatorial veto is a *legislative* act, not an executive act. *See, e.g., Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 598 (Tex. 1975); *Fulmore v. Lane*, 140 S.W. 405, 411 (Tex. 1911); *Pickle v. McCall*, 24 S.W. 265, 268 (Tex. 1893). So Governor Perry is immune from liability for his veto.

This immunity from liability applies to criminal prosecutions as well as civil suits based on legislative activity. Indeed, the core principle behind legislative immunity is to enable our "representatives to execute the functions of their office without fear of prosecutions, civil or *criminal*." *Tenney*, 341 U.S. at 373-74 (emphasis added). As courts have recognized, the "level of intimidation against a local legislator arising from the threat of a criminal proceeding is at least as great as the threat from a civil suit," so "the privilege or immunity enjoyed by local

legislators should be extended to criminal proceedings." *State v. Holton*, 997 A.2d 828, 845, 856 (Md. Ct. Spec. App. 2010), *aff'd*, 24 A.3d 678 (Md. 2011) (quotations and citation omitted).[2]

So Count I presents a particularly straightforward application of legislative immunity. A conviction under Section 39.02(a)(2) requires an inquiry into Governor Perry's subjective state of mind. *See* TEX. PENAL CODE § 39.02(a)(2) (requiring "intent to harm"). But "it is not consonant with our scheme of government for a court to inquire into the motives of legislators." *Perry*, 60 S.W.3d at 859-60 (quotations and citation omitted). "If the motives for a legislator's legislative activities are suspect, the constitution requires that the remedy be public exposure; if the suspicions are sustained, the sanction is to be administered either at the ballot box or in the legislature itself." *State v. Dankworth*, 672 P.2d 148, 152 (Alaska Ct. App. 1983). *See also Tenney*, 341 U.S. at 377-78 ("The claim of an unworthy purpose does not destroy the privilege . . . In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies.").[3]

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[2] *See also Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) ("Congressmen . . . are immune from liability for their actions within the 'legislative sphere,' even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.") (citation omitted); *D'Amato v. Superior Court*, 167 Cal. App. 4th 861, 871 (Cal. Ct. App. 2008) ("The district attorney . . . contends immunity applies only to civil suits, and does not extend to criminal prosecutions. We disagree."); *Dublin v. State*, 742 N.E.2d 232, 236 (Ohio Ct. App. 2000) ("'legislative privilege' embodies . . . substantive immunity from civil and criminal liability"); *State v. Neufeld*, 926 P.2d 1325, 1337 (Kan. 1996) ("[I]f a legislator's conduct falls within a legitimate legislative sphere, legality of the conduct is not a primary concern.").

[3] *See also United States v. Dowdy*, 479 F.2d 213, 266 (4th Cir. 1973) ("Once it was determined that the legislative function . . . was apparently being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry.'"); *Irons v. R.I. Ethics Comm'n*, 973 A.2d 1124, 1131 (R.I. 2009) ("'[A]s long as [a legislator's] challenged actions, stripped of all considerations of intent and motive, were legislative in character, the doctrine of absolute legislative immunity protects them from such claims.'") (citation omitted); *D'Amato*, 167 Cal. App. 4th at 869 ("courts cannot inquire into the impetus or motive behind legislative action") (quotations and citation omitted).

3. The special prosecutor argues that legislative immunity does not apply to a criminal prosecution of a Governor's exercise of the veto power, relying heavily on a single district judge's decisions in *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), and *United States v. Mandel*, 415 F. Supp. 1025 (D. Md. 1976). But those cases are inapposite.

First, a crucial aspect of *Mandel* is not present here. The district judge in that case reasoned that "the rationale for immunity from criminal prosecution is wholly lacking" because prosecution came from the executive branch. *Mandel*, 415 F. Supp. at 1031. As the judge explained, "[t]he executive has no reason to fear for its independence as a co-equal branch of government as a consequence of any criminal prosecution brought by itself." *Id.*

But the executive branch in Texas is not unitary. The Governor and the Attorney General are separately elected. Moreover, the power to bring criminal prosecutions in Texas is divided between the Attorney General and local district attorneys, with the bulk of the authority in the hands of district attorneys. So the chief executive of Texas does have reason to fear for its independence as a consequence of criminal prosecutions brought by officials wholly outside of his authority, as evidenced by this very case.

Second, Governor Mandel was not entitled to legislative immunity in any event. *Mandel* concerned the *federal* prosecution of a *state* official. As the U.S. Supreme Court has made clear, legislative immunity does not apply in that context, because immunity derives from the separations of powers *within* a sovereign, not *between* sovereigns. *See United States v. Gillock*, 445 U.S. 360, 370 (1980). *Mandel* did not involve a state prosecution of a state official and is thus inapplicable to this case.

The special prosecutor also cites *Jorgensen v. Blagojevich*, 811 N.E.2d 652 (Ill. 2004), and *Clinton v. Jones*, 520 U.S. 681 (1997), to argue that legislative immunity should not apply in this case. But neither of those cases even remotely supports that position.

Jorgensen involved suing a governor in his official capacity to declare an official act unconstitutional. It had nothing to do with holding a governor personally liable, either civilly or criminally, for an official act. Obviously Governor Perry can be sued in his official capacity when a plaintiff is seeking to declare a government action unlawful. That happens all the time. But that has nothing to do with trying to hold him personally liable for a legislative act, as is the case here. Indeed, *Jorgensen* itself explicitly acknowledged this distinction:

> We note, moreover, that the Judges *have not sought to hold the Governor personally liable for his actions*, nor are they attempting to force him to take or to refrain from taking any particular action. He was named in the litigation because he was one of the state officials involved in the sequence of events which led to the failure of the Judges to receive their FY2004 COLAs. There is nothing unusual about his inclusion as a party. Examples of Illinois governors being joined as defendants in cases seeking *declaratory and injunctive relief* based on alleged violations of state constitutional and legal requirements are commonplace.

Jorgensen, 811 N.E.2d at 652 (emphasis added).

The special prosecutor curiously omitted this passage from his discussion of *Jorgensen*, even though it appears immediately before the passage that the special prosecutor chose to block quote. This omission is telling. After all, the passage shows that a governor *would* have legislative immunity if someone were seeking to hold him "personally liable for his actions," *id.*—as the special prosecutor is attempting to do here.

Clinton is not helpful to the special prosecutor either. The Supreme Court there said that immunity does not apply to *unofficial* conduct—but that it would apply to *official* acts. As the Court explained, "[t]he principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct."

Clinton, 520 U.S. at 692-93. Here, Governor Perry is being held criminally liable for an official act (a veto), not for any unofficial conduct, so he is entitled to immunity.

* * *

Allowing Count I to proceed would utterly defeat the purpose of legislative immunity. Governors "must enjoy the same ability to speak and act in their legislative capacities, without fear of retribution, either criminally or civilly, because of what they say or how they vote." *Holton*, 997 A.2d at 856. Governors "may be called upon to answer for their legislative conduct to the citizens who elected them, which is what democracy is all about." *Id.* "[B]ut they may not be compelled to defend their legislative conduct to a prosecutor, to a grand jury or to a court." *Id.*

II. Count II of the Indictment Should Be Dismissed, Because It Criminalizes Speech Protected by the First Amendment of the U.S. Constitution.

Count II of the indictment alleges that Governor Perry violated the law by "threatening" to use his veto powers if a government official did not resign her post. But he has every right to do just that. Criminalizing Governor Perry's threat to veto legislation violates his right to freedom of speech under the Texas and U.S. Constitutions. This Count must also be dismissed.

A political official has the right to threaten to engage in an official act in order to persuade another government official to engage in some other official act. That is not a crime—it is core political speech. *See, e.g.*, *Watts v. United States*, 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech.").

The Waco Court of Appeals said precisely that in a similar case over twenty years ago. *See State v. Hanson*, 793 S.W.2d 270 (Tex. App.—Waco 1990, no writ). In that case, a county judge "was charged with having made a *threat* to take action as a public official in an attempt to *coerce* another public official into performing an official act." *Id.* at 272. Specifically, the

defendant in *Hanson* threatened to terminate some of the county's funding in order to coerce a district judge to fire a county auditor and to coerce a county attorney to revoke an individual's probation. *Id.* at 271-72. Both the trial court and the court of appeals correctly dismissed the charges. As the court explained, in this sort of political context, "[c]oercion of a lawful act by a threat of lawful action is protected free expression." *Id.* at 272.

So too here. Governor Perry has been charged with attempting to "coerce" a lawful, official act (the voluntary resignation of a public official) by threating to take a lawful, official act (the veto of an appropriations bill). That is protected free expression, and the Governor cannot be prosecuted for it.[4]

Moreover, the consequences of allowing Governor Perry to be prosecuted under this law would be both far-reaching and devastating. The prosecution's theory of the case would criminalize a vast swath of constitutionally protected—and exceedingly common—political speech. For example, it would make it illegal for:

- a legislator to tell the Governor, "if you appoint John Smith to this position, I won't vote for this law you want me to support";
- a Governor to tell a legislator, "if you don't amend this bill in a particular way, I'll veto it";
- a state legislator to tell a U.S. Senator, "if you vote for this federal bill, I'll vote against this state law that you like";
- a legislator to tell the Governor, "if you don't resign, I'll vote to impeach you"; or

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[4] We accept here for purposes of argument the special prosecutor's position that District Attorney Lehmberg's resignation would have constituted an official act. But if leaving office is not an official act, then the elements of Section 36.03(a)(1) would not be satisfied, since that statute refers only to attempts to influence the exercise of official power or official duty.

- a government employee to tell his supervisor, "if you don't give me a raise, I'll ask for a transfer to a different department."[5]

We need not limit ourselves to hypotheticals. Consider, for example, what happened during the Texas Youth Commission controversy in 2007. Countless state legislators across the political spectrum demanded the resignation of the commissioners—and threatened legislative action if they refused. *See, e.g., Lawmakers Decry Abuses Within Texas Youth Commission*, TEXAS SENATE NEWS, Feb. 27, 2007 ("[Senator] Ogden said the Finance Committee is prepared to use the power of the purse to influence change at TYC . . . . He said significant changes will have to occur within TYC, enough for him to have confidence to recommend to his committee members that 'any appropriation' should go to the agency."); *Perry: Board to Resign*, WAXAHACHIE DAILY LIGHT, Mar. 15, 2007 ("[At] a meeting of the joint committee charged with addressing problems at the TYC, lawmakers asked for the resignation of the board members, going so far as to pass a vote of no confidence against the board.").

Likewise, when U.S. Senator Larry Craig was arrested for indecent conduct in a public restroom, "Republican leaders embarrassed by Craig's behavior and news conference threatened

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[5] This list of protected speech that would be deemed criminal reveals another fundamental problem with this count: the statute is unconstitutionally overbroad and therefore facially invalid. So although Governor Perry engaged in constitutionally protected expression, in fact *no one* can be prosecuted under this statute.

A law is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008) (quotations and citation omitted). And notably, prosecutorial discretion is not a defense to a statute that is overbroad. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Here, the law—as interpreted by the prosecution—would plainly capture an overwhelming amount of protected speech. It is accordingly unconstitutionally overbroad.

to conduct hearings if Craig did not resign." *Hardball with Chris Matthews*, MSNBC, Sept. 5, 2007.

And when it was revealed that U.S. Representative Anthony Weiner had sent sexually themed photographs of himself via Twitter, "his fate was sealed . . . when party leaders in Congress and President Barack Obama began vociferously calling for him to go and threatened to remove him from various committees." Alex Spilius & Jon Swaine, *Anthony Weiner Resigns over Lewd Twitter Photographs*, TELEGRAPH (U.K.), June 16, 2011.

According to the prosecution in this case, it would have been a crime under Texas law for any of those officials to demand the resignation of other officials, and then inform the other officials of potential retaliatory legislative actions if they refused. That cannot be correct. What the Texas legislators did in 2007, what the U.S. Senate Republican leadership did in 2007, and what the U.S. House Democratic leadership did in 2011 was neither criminal nor capable of being criminalized—it was protected political speech.

And so too here. Just as Texas legislators were entitled to demand the resignation of the members of the Youth Commission, and just as members of Congress were entitled to demand the resignation of a Senator and a Representative who had disgraced their offices, Governor Perry was entitled to demand the resignation of an official whom he felt was no longer serving the best interests of the Texans he was elected to represent—and to promise to use his constitutionally provided veto power to achieve his goal. That was protected speech, and the State cannot criminalize any of it.

* * *

Just last week, President Obama renewed his earlier threats to issue various executive orders if Congressional Republicans refused to pass comprehensive immigration reform. *See,*